82-980

No.

In the Supreme Court of the United States

October Term, 1982

ROBERT E. SADLAK,
Petitioner,

ROBERT S. CELESTE vs.
~~JAMES A. RHODES,~~ Governor, State of Ohio; ANTHONY J. CELEBREZZE, JR., Secretary of State of Ohio; MAHONING COUNTY BOARD OF ELECTIONS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For the Sixth Circuit

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QUESTIONS PRESENTED

I. Whether a decision of the district court which dismissed with prejudice for failure of prosecution, but without addressing the merits, a complaint seeking an injunction to require the Respondents to place Petitioner's name on the 1980 general election ballot as a candidate for Congress will bar as res judicata or collateral estoppel the Petitioner's subsequent complaint seeking an injunction to require Respondents to place his name on the 1982 general election ballot as a candidate for Congress.

II. Whether Ohio Revised Code Section 3513.257(C) which provides that one who seeks status as an independent candidate for Congress must present nominating petitions containing signatures of at least one per cent of the number of electors who voted for the office of governor at the next preceding election for that office, while Ohio Revised Code Section 3513.05(D) requires that one who seeks status as the nominee of a major political party for Congress must present nominating petitions containing just 150 qualified signatures, violates the equal protection clause of the Fourteenth Amendment and the Associational Rights guaranteed by the First Amendment.

III. Whether Ohio Revised Code Section 3513.257(C), which requires that one who seeks to be an independent candidate for Congress submit a petition containing a designated number of signatures in order to appear on the ballot, imposes an "additional qualification" in violation of Article I, § 2, cl. 2 of the United States Constitution.

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The Petitioner Robert E. Sadlak respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 15, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, No. 82-3157, is unreported and is reproduced in the Appendix to this Petition at page A1. The opinion of the United States District Court for the Northern District of Ohio, No. C82-8Y, is unreported and is reproduced in the Appendix to this Petition at page A3.

The opinion of the United States District Court for the Northern District of Ohio upon which the judgment of res judicata is based, No. C80-312Y, is unreported and is reproduced in the Appendix to this Petition at page A7.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit was entered on October 15, 1982. The decision of the United States District Court for the Northern District of Ohio was entered on January 26, 1982. Jurisdiction is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States,

Article I, Section 2, Clause 2

No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected be an Inhabitant of that State in which he shall be chosen.

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Revised Code Section 3513.05(D)

If the declaration of candidacy is of one that is to be submitted only to electors within a district, political subdivision, or portion thereof, the petition shall be signed by qualified electors who are members of the same political party as the political party of which the candidate is a member in numbers as follows:

* * * * *

(D) In any district, political subdivision, or portion of a political subdivision such petition shall contain a minimum of one hundred fifty qualified signatures if the vote for the office of governor at the next preceding election for that office in such district, subdivision, or part thereof was fifty thousand or over.

Ohio Revised Code Section 3513.257(C)

The prospective independent joint candidates' statement of candidacy shall be filed with the nominating petition as one instrument. The nominating petition shall contain signatures of qualified electors of the district, political subdivision, or portion of a political subdivision in which the candidacy is to be voted for in an amount to be determined as follows:

* * * * *

(C) If the candidacy is to be voted for by electors in any district, political subdivision, or part thereof in which five thousand or more electors voted for the office of governor at the next preceding election for that office, the nominating petition shall contain a number of signatures equal to at least one per cent of those electors.

STATEMENT OF THE CASE

On January 4, 1982, the Petitioner, Robert E. Sadlak, acting *pro se*, filed a Complaint in the United States District Court for the Northern District of Ohio. By that Complaint, Mr. Sadlak sought a declaration that Ohio Revised Code Section 3513.257(C) is unconstitutional since it discriminates against independent candidates for Congress as opposed to candidates of the major parties and also sought an order directing election officials to place his name on the November 1982 general election ballot as a candidate for Congress.

The District Court below did not resolve the case on the merits of the constitutional claims raised. Rather, without giving the parties an opportunity to brief the issue, the Court, *sua sponte*, dismissed the Complaint upon the theory that the proceeding was barred by the doctrine of res judicata (A3).

The basis for invoking res judicata was the fact that in a prior case, identified as No. C80-312Y, Mr. Sadlak had sought an injunction requiring election officials to place his name on the 1980 November ballot as a candidate for Congress. The defendants in that proceeding had entered a Motion to Dismiss for Failure to State a Claim; Mr. Sadlak's counsel had not filed any response to the Motion; and the Court had "unsuccessfully at-

tempted to contact plaintiff's attorney by phone on several occasions." Under those circumstances, the trial judge specifically refrained from ruling on the pending Motion to Dismiss, but instead dismissed the case "with prejudice for failure to prosecute" (A7). Thus, the trial judge did not rule upon the merits of the claim presented by Mr. Sadlak. That judgment was not appealed.

Nevertheless, the District Court utilized that prior judgment as a basis for invoking the doctrine of res judicata to dismiss the case at bar. Mr. Sadlak then retained counsel and took an appeal from the decision of the District Court. On October 15, 1982, the Court of Appeals affirmed the judgment below. The Sixth Circuit agreed that Mr. Sadlak's suit was barred by the doctrine of res judicata. Even though no evidentiary hearing was conducted below,[1] the Court also held that even if the suit were not barred by res judicata, it would find the underlying action which challenged the constitutionality of Ohio Revised Code Section 3513.257(C), requiring the nominating petition of an independent candidate for elected office to contain a greater number of signatures than the petition of a candidate for party nomination, to be without merit.

Petitioner is now before this Court seeking an order granting a writ of certiorari to review the decision of the Court of Appeals for the Sixth Circuit.

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1. In his Brief to the Court of Appeals for the Sixth Circuit, Petitioner sought a remand for an evidentiary hearing in the event that the Appeals Court did not grant him judgment as a matter of law on the Equal Protection and Article I, § 2, cl. 2 claims.

ARGUMENT IN SUPPORT OF THE WRIT

I. Petitioner's claim to achieve ballot access in 1982 should not be barred by the doctrines of res judicata or collateral estoppel on the basis of a claim to achieve ballot access in 1980, particularly where that case was dismissed and did not address the merits.

As set forth by the Statement of the Case, the rule adopted by the Sixth Circuit Court of Appeals prevents Petitioner from seeking ballot access in 1982 because he was denied ballot access in 1980. It also serves to extend the bar of res judicata or collateral estoppel to cases where there has never been a determination upon the merits of the claim. As a result, a plaintiff may be forever deprived of a trial on the merits of his claim and "his day in court."

While it would appear that the rule of the Court of Appeals is a misapplication of the general principles of res judicata and collateral estoppel, it is also true that there is scant authority for the application of these principles in the context of election laws. But, Petitioner submits, there is no logical reason why these principles should not apply to those cases.

It has been established generally that res judicata "bars the relitigation of the same claim or cause of action" and that collateral estoppel "bars the relitigation of issues in a different cause of action" *First Florida Building Corp. v. Smith,* 530 F. Supp. 496, 498 (N.D. Ga. 1982) where such issues were "actually presented and determined in the first suit." *Commissioner v. Sunnen,* 333 U.S. 591 (1947). The proper application of these principles to the instant case would not impose a bar to its litigation. This is so because Petitioner is not seeking to relitigate the same claim in this suit as presented by the 1980 suit.

The factual basis is different and the relief sought is different. Further, since no issues were actually determined in the 1980 suit, Petitioner is not attempting to relitigate issues which were resolved in that suit.

The principles of res judicata and collateral estoppel are general ones which should apply to all types of cases across the nation. By definition, any novel interpretation of those rules can have widespread effects upon the dockets of all state and federal courts. The course embarked upon by the District Court and affirmed by the Court of Appeals reaches beyond this individual case and touches upon all potential cases involving requirements that may exist on a recurring basis. Those cases cover a wide range of matters on both state and federal levels and include election, tax, licensing, and any other matters capable of repetition.

This Court has already made it clear that these general principles do apply to tax matters. *Commissioner v. Sunnen*, 333 U.S. 591 (1947) The application of *Sunnen* to the case at bar because of the similarity between tax matters and elections was urged by Petitioner in the Court of Appeals. The failure of the Sixth Circuit to apply these principles to the election questions in the case at bar and the lack of direct authority on the subject suggests that this case is worthy of the attention of this Court.

II. The Ohio statutory scheme burdens independent candidates for Congress in violation of the Equal Protection Clause of the Fourteenth Amendment and the Associational Rights protected by the First Amendment.

Ohio Revised Code Section 3513.257(C) requires that one who seeks status as an independent candidate for

the office of member of the House of Representatives must present nominating petitions containing the signatures of at least one per cent of the number of electors who voted for the office of governor at the next preceding election for that office. At the same time, Ohio Revised Code Section 3513.05(D) requires that one who seeks status as the nominee of a major political party for the office of member of the House of Representatives, must present nominating petitions containing just 150 qualified signatures.

This means, in effect, that as an independent candidate for Congress, Mr. Sadlak is required to obtain 1450 to 1500 valid signatures, while a major party candidate is required to obtain just one-tenth that number. These facts, on their face, demonstrate that the Ohio election laws discriminate against independent candidates for Congress. These laws violate the fundamental rights of free association and equal protection as guaranteed by the First and Fourteenth Amendments.

History supports the view that there is no rational basis in imposing stricter controls upon independent candidates than upon candidates of major parties. That this nation has a long history of minor parties and independent candidates cannot be doubted. Indeed, prior to 1888, there were no laws restricting the opportunities for new candidates and new parties to form and compete effectively in elections. McCarthy & Armor, *Election Laws: A Case of Deadly Reform*, 57 N.D.L.Rev. 331, 332 (1981) Not only was there no demonstrable harm to the electoral system, but there is much evidence that independent candidates and minor parties performed an important function in the political process: raising and developing policies long before the established parties were prepared

to act. Their presence in the campaign and on the general election ballot permitted voters to demonstrate support for new or unorthodox ideas - many of which were ultimately adopted by the major parties. *See* BICKEL, REFORM AND CONTINUITY, 79-80 (1971).

In another context, this Court has recognized that:

> "*All political ideas cannot and should not be channeled into the programs of our two major parties.* History has amply proved the virtue of political activity by minority, dissident groups, which enumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society." *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (Emphasis added.)

This case presents the question of whether these same principles should be directly applied in the context of election laws. It puts the principle to the test. There have been, to be sure, numerous cases involving the rights of independent candidates to achieve ballot access before this Court. But it does not appear that this argument was properly raised or formed a significant part of those decisions.

From the perspective of a history with a complete lack of restrictions on the right to ballot access, such restrictions today hardly seem necessary to the preservation of the system. Mr. Sadlak suggests that there is no single instance where access to the ballot such as that advocated here has produced identifiable harm. Therefore, any possible state "interest" to be articulated is too speculative to meet either the rational basis or strict scrutiny tests.

Upon the arguments raised, this issue presents an important question of law which should be considered by this Court.

III. The Ohio statutory scheme places an "additional requirement" upon independent candidates for Congress in violation of Article I, § 2, cl. 2.

Article I, § 2, cl. 2 of the Constitution of the United States provides that:

> "No person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected be an Inhabitant of that State in which he shall be chosen."

Mr. Sadlak maintains that Ohio's requirement that candidates for Congress submit petitions with a designated number of signatures in order to appear upon the ballot is contrary to this constitutional provision as an additional qualification to hold the office of Representative.

Clearly, the interpretation of Article I, § 2, cl. 2 is of constitutional significance and importance because it governs the democratic process for the entire nation. The proper interpretation of this clause has been before this Court on two occasions. In the first, *MacDougall v. Green*, 335 U.S. 281 (1948) (state-wide race, requirement to secure signatures for petitions from each county), the Court did not reach the merits of the claim because it held the matter was non-justiciable. This holding was, of course, overruled *sub silentio* in *Baker v. Carr*, 369 U.S. 186 (1962). Subsequently, a challenge similar to the case at bar was presented in *Storer v. Brown*, 415 U.S. 724 (1974) and rejected in what appears to be a cursory consideration of the constitutional question. *See*

Storer v. Brown, supra at 746, n. 16. Thus, having never been given full consideration,[2] the question appears to merit the attention of this Court.

Early in the history of this nation, the question of whether Congress itself should play any role in determining the qualifications of members of Congress was rejected. In explaining the reasons for the rejection of such proposal, it was James Madison who explained that "the qualifications of elected representatives of the people were fundamental Articles in a Republican Government and ought to be fixed by the Constitution." 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 249-251. The view that Article I, § 2, cl. 2 ought to provide the sole and exclusive qualification for members of the House of Representatives has been affirmed by this Court in *Powell v. McCormack*, 395 U.S. 486 (1969).

A similar view also prevailed after the ratification of the Constitution. For example, in the case of William McCreery, the Tenth Congress seated McCreery because he met the requirements of Article I, § 2, cl. 2, even though he did not meet an additional state requirement. Two of the important principles articulated were that there had been no delegation to either the States or Congress to either add or diminish the qualifications for Congress as prescribed by the Constitution; and that the people had a *natural right* to make a choice of their Representatives and that such a right could be

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2. And to the extent the issue was considered, Petitioner would press the view that the result was incorrect and that upon further consideration, would result in adoption of his interpretation of Article 1, § 2, cl. 2.

This is so because it is clear that the doctrine of *stare decisis* has a limited role in the consideration of constitutional issues. *Compare e.g. Twining v. New Jersey*, 211 U.S. 78 (1908) with *California v. Griffin*, 380 U.S. 609 (1965) where the Court reached opposite results on the basis of different arguments.

limited or altered only by a convention of the people and not by a legislature. *See* ANNALS OF CONGRESS FOR THE TENTH CONGRESS, at 872-916.

As suggested above, there were absolutely no laws restricting the opportunities for new parties to arise and compete effectively in elections prior to 1888. McCarthy & Armor, *Election Laws: A Case of Deadly Reform*, 57 N.D.L.REV. 331, 332 (1982) For example, the pre-Civil War era offers instances of several competing parties:

Anti-Masonic Party (1826-1834)

Democratic Party (1832-present)

Whig Party (1836-1854)

Liberty Party (1840-1846)

Native American Party ("Know Nothings") (1834-1860)

Free Soil Party (1847-1852)

Republican Party (1854-present)

Constitutional Union Party (1860)

See Generally, THE COLUMBIA ENCYCLOPEDIA (3rd ed. 1968), HESSELTINE, THIRD PARTY MOVEMENTS IN THE UNITED STATES (1962).

But then, sparked by the "threat" posed by the success of the Granger Movement, the Farmer's Alliance, the Populist Party, and particularly the Progressive ("Bull Moose") Party of former President Theodore Roosevelt, the major parties began imposing restrictions—such as those imposed here upon Petitioner Sadlak. These restrictions counter the intent of the framers and reverse the history of free ballot access. The result has been a diminution of the ability of independents and third-party members to obtain ballot access and thereby enjoy their First

Amendment rights. Certainly, even well-organized third-party candidates with the advantage of mass media exposure today face perhaps insurmountable difficulties. *See e.g. Anderson v. Celebrezze,* 664 F.2d 554 (6th Cir. 1981), *prob. juris. noted,* 50 U.S.L.W. 3875 (1982).

Since this issue presents a question of nationwide importance and timely significance, and has never been fully considered, it merits the attention of this Court.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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